VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Chester and Donna Brileya by
A. Jay Kenlan, Esq.
P.O. Box 578
Rutland, VT 05701
and
Stewart A. Smith
South Main Street
Rutland, VT 05701

Findings of Fact,
Conclusions of Law and
Order

Application #1R0580-EB

This decision pertains to an appeal filed with the Environmental Board ("the Board") on December 9, 1985, by Applicants Chester and Donna Brileya from the November 12, 1985, decision of the District #1 Environmental Commission ("the Commission") denying Land Use Permit Application #1R0580 ("the Application"). The Application sought approval for the construction and operation of an automobile sales and service facility adjacent to Route 7 in the Town of Rutland, Vermont.

On December 13, the Board notified the parties of its intention to conduct the hearing 'in this matter by way of an administrative hearing panel pursuant to Board Rule 41 and 3 V.S.A. Section 813. Hearings were twice scheduled by the Board and, at the Applicants' request, postponed. Having heard no objection to the use of a hearing panel, Board Chairman Bradley and Members Bongartz and Lloyd convened the public hearing in this appeal on March 31, in Rutland with the following present:

Applicants Donna and Chester Brileya by A. Jay Kenlan, Esq.
State of Vermont, Department of Agriculture by Stephen Sease, Esq.
David Dickenson, an interested party wishing to participate under EBR 14(B).

The panel took a site visit on March 31, and the hearing was recessed on that date pending the preparation of a Proposed Decision, and a review of the record and deliberation by the full Board. A Proposed Decision was issued on April 11, 1986, and all parties were notified of their right to present oral and written argument to the full Board. No party having requested the opportunity to present such argument, the Board reviewed this matter on April 30, found the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based exclusively upon the record developed at the hearing and the circumstances observed at the site visit.

I. ISSUES IN THE APPEAL

On August 27, 1985, Chester.Brileya, Donna Brileya and Stewart Smith filed the Application seeking approval for an automobile dealership to be constructed on a five-acre portion of Smith's 20 acre parcel located on the west side of Route 7 in the Town of Rutland. The Commission's denial of the Application was based solely upon 10 V.S.A. Section 6986 (a) (9) (B) pertaining to "Primary Agricultural Soils." The Commission made the following findings:

a) The entire 20 acre parcel owned by Stewart Smith (5 acres of which was under option to the Brileyas) is considered part of the project site and is subject to evaluation under Criterion 9(B);

b) Nine of the 20 acres meet the 10 V.S.A. Section 6001(15) definition of the term "primary agricultural soils," including four acres under option to Brileya;

c) Construction of the dealership would significantly reduce the potential of the prime agricultural soils;

d) A reasonable return on the fair market value of the 20 acre site could be secured only by developing a commercial project on the parcel;

e) The Applicants do not own non-prime agricultural soils reasonably suited to the construction of an auto dealership;

f) The Applicants failed to present evidence that the project was planned to minimize the reduction of the soils' agricultural potential; and

g) The project would not interfere with or jeopardize any adjoining agricultural operation.

At the outset of the Board's hearing, counsel for the Applicant'and AEC announced that the two parties had reached a stipulated agreement as to the facts pertinent to the appea 1. Specifically, because Mr. Smith had conveyed title to an eight-acre portion of the site to the Brileyas, both parties agreed that the project no longer involved the development of "primary agricultural soils" because the land is not "of a size capable of supporting or contributing to an economic agricultural operation" as required by Section 6001(15).

Exhibits #1 and #2 were admitted by stipulation of the parties. The findings of fact stated below are based upon those exhibits, the parties' oral stipulation of facts and the panel's site visit.

II. FINDINGS OF FACT

1. Chester and Donna Brileya filed Land Use Permit Application #1R0580 with the District #1 Commission on August 27, 1985. The Application sought approval for the construction and operation of an automobile dealership on a five-acre tract located on the west side of Route 7 in the Town of Rutland.

2. Stewart A. Smith co-signed the Application pursuant to EBR 10(A) because, at the time of application filing, Mr. Smith was the record owner of a 20 acre parcel, a five-acre portion of which was the subject of a sales agreement with Chester and Donna Brileya. The Smi th - Brileya sales agreement called for consummation of the transaction before January 1, 1986.

3. In December, 1985, Smith transferred to the Brileyas an eight acre portion of his 20 acre Route 7 property. The parcel transferred included all of the original five acres under contract together with an additional three acres adjacent to and westerly of the five-acre tract.

4. '11 of the 20 Smith acres are considered by the Department of Agriculture to be "primary agricultural soils" as that term is defined by 10 V.S.A. Section 6001(15). The Applicants agree that the 11 acres meet the soil quality requirements of Section 6001(15) but argue that 11 acres is not a "size capable of supporting or contributing to an economic agricultural operation."

5. Smith transferred less than five of the 11 "prime" acres to the Brileyas. Smith has no ownership, management or financial interest in the dealership which the Brileyas intend to operate, nor does he have any ownership interest in the eight-acre parcel conveyed to the Brileyas.

6. The southeast corner of the Brileya tract contains Stockbridge soils which have high agricultural potential. The central portion of the Brileya tract consists of Deerfield soils which are of

lower quality than Stockbridge but are nevertheless agriculturally productive. The western extension of the Brileya tract adjoins the East Creek and, because the soils in this section are typically wet, the area is not suitable for agricultural use. Exhibit #1.

7. Substantial excavation has occurred in the southeast corner of the site in the area where the dealership building and parking area are to be constructed.

III. CONCLUSIONS OF LAW

As the Supreme Court confirmed in In re: Spear Street Associates, 145 Vt. 496 (1985), in evaluating a project under Criterion 9(B), we must first determine whether a proposed project would involve the development of "primary agricultural soils." The latter term is defined by 10 V.S.A. Section 6001(15) and that section contains the following limitation:

> In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation.

(Emphasis added.) If we conclude that the project does not involve development of prime agricultural soils, we must also conclude that the Applicants have met their burden with respect to Criterion 9(B).

The parties have stipulated that a parcel of less than five acres at this particular location is not of a size capable of supporting or contributing to an economic agricultural operation. No party in attendance on March 30, was prepared to offer evidence to the contrary. 3 V.S.A. Section 809(d) authorizes this Board to informally dispose of issues on appeal based upon a stipulation of the parties. There being no evidence in support of the notion that the Brileya parcel fulfills the Section 6001(15) definition, we conclude that construction of the automobile dealership will not involve the development of "primary agricultural soils."

In reaching this conclusion we note our agreement with the Commission's finding that, as of the time of its proceedings in this case, all 20 of the Smith acres were "involved" in the Brileya project by virtue of EBR 2(F) and were properly considered by the Commission in its Criterion 9(B) analysis. However, this Board's proceedings are de

novo and we must evaluate the facts pertinent to Criterion 9(B) as they exist when we convene our proceedings. See 10 V.S.A. Section 6089(a) and In re Poole, 136 Vt. 242, 245-246 (1978). On March 30, Smith no longer owned or controlled the project site, nor did he have any financial or management interest in the proposed dealership. Based upon these facts, together with the parties' stipulation with regard to Section 6001(15), we must conclude that Criterion 9(B) has been satisfied.

Three additional matters require clarification:

1) Our decision with regard. to the capability of the Brileya parcel to support or contribute to an economic agricultural operation is strictly limited to the facts of this case. Depending upon location, proximity to markets and other circumstances, small tracts containing agricultural soils may well contribute to or support viable farming operations. See In re: Spear Street Associates, supra.

2) We have not proceeded beyond the threshold issue of whether the Brileya project involves prime agricultural soils. Therefore, we express no judgment concerning the Commission's findings with regard to the sub-criteria of Criterion 9(B).

3) It was readily apparent during the panel's site visit that a substantial portion of the Brileya tract had been excavated in the recent past. If that excavation was performed for a commercial purpose, the responsible party violated 10 V.S.A. Section 6081(a) and may be subject to the sanctions provided by 10 V.S.A. Sections 6003 and 6006. We will investigate this issue further and take appropriate action.

IV. ISSUANCE OF LAND USE PERMIT

In accordance with the above findings of fact and conclusions of law, we will issue Land Use Permit #1R0580-EB. The Board hereby incorporates by reference as if fully set forth and adopts as its own, the findings of fact and conclusions of law reached by the Commission which were not appealed and which are not affected by our decision., The Permit now issued approves the project subject to conditions which are reflected in the Commission's November 12, 1985 Decision (i.e., conditions which the Commission would have imposed had Criterion 9(B) not been an obstacle to the issuance of a permit).

Based upon the foregoing findings of fact and conclusions of law, it is the conclusion of the Board that the project described in Land Use Permit Application #1R0580 (as amended on appeal), if completed and maintained in accordance with all the terms and conditions of that application, the exhibits presented to the Commission and the Board, and the conditions set forth in Land Use Permit #1R0580-EB, will not cause or result in a detriment to the public health, safety or general welfare under the Criteria set forth in 10 V.S.A. Section 6086(a).

V. ORDER

Land Use Permit #1R0580-EB is hereby issued in accordance with the Findings of Fact and Conclusions of Law herein. Jurisdiction over this matter is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont this 1st day of May, 1986.

VERMONT ENVIRONMENTAL BOARD

Darby Bradley, Chairman
Ferdinand Bongartz
Dwight E. Burnham, Sr.
Samuel Lloyd III
Donald B. Sargent

Dissenting:
Jan S. Eastman
Lawrence H. Bruce, Jr./1/

/1/ Members Eastman and Bruce would require the production of evidence concerning the issue of whether the Brileya site could contribute to an economic agricultural operation. While they do not disagree with the majority's conclusions, Bruce and Eastman would prefer the presentation of evidence concerning the site vis-a-vis active farming operations and agricultural markets.